

MIN (Migration) [2019] AATA 509 (15 February 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs TOUAM MIN
VISA APPLICANT:	Mr LEANG HOV NGET
CASE NUMBER:	1713438
DIBP REFERENCE(S):	BCC2016/2175351
MEMBER:	Angela Cranston
DATE:	15 February 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 15 February 2019 at 2:22pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – commitment to one another – hasty decision to marry – conflicting information provided – credibility issues – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 May 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 21 June 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. In the application (and repeated in the Department's decision which was given to the Tribunal), the applicant stated that the parties were introduced over the phone on 15 March 2015, first met at Phnom Penh airport on 22 March 2016 and were married on 2 April 2016. The Department's decision also records that the review applicant returned to Australia on 19 April 2016 and again departed for Cambodia on 19 February 2017 and returned on 7 March 2017.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 for the following reasons:

In assessing the financial aspects of the relationship between the applicant and sponsor I have taken into consideration the following points: the joint ownership of assets, any joint liabilities, the extent to which the applicant and sponsor pool financial resources, any legal obligations to each other, the general sharing of daily household expenses and future financial planning.

I have considered four money transfers from the sponsor to the applicant provided with the application. While I have considered this evidence, it is the experience of this post that applicants provide evidence of money transfers to add weight to the claimed relationship rather than because genuine financial ties exist.

When the financial aspects of relationship were discussed at interview, I note the applicant stated the sponsor paid for the cost of the wedding and had sent the applicant funds on several occasions. I note this conflicts with the applicant's written statement lodged with the application that states both the applicant and sponsor shared costs of the wedding. I also acknowledge that the applicant has some knowledge of the sponsors' employment in Australia. However neither the applicant nor sponsor were able to provide any detailed plans regarding future finances or financial management.

Based on the limited evidence provided with the application and responses at interview I am not satisfied the applicant and sponsor have demonstrated any joint finances, assets and liabilities with each other. While I have considered the several fund transfers from the sponsor and applicant, I afford this little weight as evidence of sharing finances in a meaningful way. I place weight on the fact that no discussions have taken place regarding future financial responsibilities as would be expected of a couple planning to spend their life together. I am therefore not satisfied the applicant and sponsor have demonstrated any significant way the financial aspects of their relationship.

The nature of the household

I acknowledge that the applicant and sponsor live in different countries. I am therefore prepared to accept that they are unable to provide any substantial proof of a previous history of living together in a joint household. However it is reasonable to expect that two people in a mutually committed relationship would have a good understanding of the others living circumstances.

At interview and asked about sponsor's daily routine the applicant was able to provide information regarding the sponsors work various employers and her daily routine in relation to her employment. I also note that discussion regarding plans for the future based on responses interview. Given this, I accept the applicant has some knowledge of the sponsor and I forward this some weight in my assessment

The social aspects of the relationship

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.. It is the experience of this post that applicants take many photographs of the wedding as evidence of the relationship. It is the experience of this post that applicants take many photographs in similar settings in order to strengthen their application rather than as a genuine way of documenting their relationship. Therefore while I am satisfied that the applicant and sponsor have met and spent time together I note photographs alone do not evidence the existence of a genuine relationship or that is recognised by friends, family or the wider community.

I have considered the form 888 provided by Rin Tun, Ten Kong Toeum Min and Mony Noun. However I note the information within the forms is generic in nature and does not include any meaningful insight as to how the applicant and sponsor generally present themselves as couple or are seen as a couple to friends, family and the wider community. I also note that based on evidence provided, the sponsor's children did not attend the wedding. This raises some concerns of the relationship is not recognised by the sponsor's children.

Overall I am not satisfied the applicant has demonstrated wider acknowledgement of the relationship. I therefore find these documents little weight in assessing social aspects of the relationship. I am not satisfied from the evidence before me that the applicant and sponsor generally present themselves as couple or are seen as a couple to friends, family and the wider community.

The nature of the persons' commitment to each other

In assessing the nature of the commitment to each other I have considered the circumstance of the applicant sponsor's meeting, relationship development, length of time together, the degree of companionship and emotional support that drawn from each other and whether the applicant and sponsor see the relationship as a long-term one.

I have considered the scans of Lyca mobile cards provided with the application as evidence of communication. However given there is no identifying information to indicate they relate to the applicant and sponsor I am unwilling to afford these any weight as evidence of ongoing communication. I note reference is made to communicating via Facebook but no evidence was provided. When this was discussed at interview the applicant provided no response. The sponsor stated she did not know what to provide for the application. No other evidence of communication has been provided nor evidence to support the claim the applicant and sponsor have been communicating since March 2015. As such, I cannot be satisfied the applicant and sponsor have known each other for as long as claimed.

I have considered a number of significant discrepancies regarding the information provided by the applicant and sponsor. Their verbal statements at interview were also inconsistent with the written statement lodged with the application. As referred to above the applicant gave information regarding the funding for the wedding that conflicted with the written statement lodged in support of the application regarding the inception and progression of the relationship. As referred to above, the applicant gave information regarding the funding for the wedding that conflicted with the written statement lodged in support of the application regarding the inception and progression of the relationship.

The applicant and sponsor were asked to provide information regarding several of the photographs from the wedding reception. One particular photograph titled our first dance depicts the applicant and sponsor dressed in white with a number of people in the background. It was raised with the applicant and sponsor that the people appeared to be overly casually dressed for a Khmer wedding which is not common culturally. The applicant stated he did not know any of the onlookers in this particular photograph and they had not been invited. The sponsor stated they were the family and friends of the applicant but they were poor. Given the conflicting information and the appearance of the guests I have serious concerns that the photographs were staged in order to strengthen the applicant's claims he is in a genuine ongoing relationship and that a large group of people attended the wedding celebrations.

The applicant and sponsor gave conflicting responses regarding another photograph depicting the applicant, the sponsor and the sponsor's brother and sister-in-law. The applicant was asked why the sign which commonly identifies who is getting married was left blank only stating groom and bride in Khmer. The applicant stated the agency hired to provide decoration forgot to put their names on the sign but that he did not notice until later during the celebrations. The sponsor stated her name had been spelt incorrectly so they removed both names as the photographs would not look good for immigration. The sponsor asked me if next time they should provide the photographs with the application. When I sought clarification as to whether sponsor was intending on marrying again she provided no response.

The applicant and sponsor provided inconsistent information regarding the wedding preparations. The applicant initially stated the preparations began two weeks prior to the actual ceremony and later amended that to 2 months. When clarification was sought several times through the interview the applicant confirmed the arrangements began two weeks before the wedding ceremony. The applicant stated his mother came to him two weeks before the wedding and suggested he marry the sponsor to which he agreed. The applicant's mother then began to make preparations. The applicant further stated his mother

chose the 2 April 2016 for the ceremony and advised both the applicant sponsor of this. The sponsor however stated that the original date of the wedding was in March but she could not travel to Cambodia because of work. The sponsor stated it was the applicant who decided the wedding would take place on 2 April 2016.

I've considered the discrepancies above and place considerable weight on the conflicting information provided. I find the limited evidence of commitment and knowledge of each other's lives, the lack of future planning, and the inconsistent information provided by both the applicant and sponsor raises concerns as to the genuineness of the relationship and whether it is viewed as a long-term relationship.

The facts before me raise concerns the relationship may have been contrived in order to secure a migration outcome rather than because the applicant sponsor committed to a shared life together.

6. The review applicant appeared before the Tribunal on 8 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant:
7. The Tribunal put to the review applicant that at interview, the applicant stated that she paid for the wedding but this conflicted with the review applicant's statement which was that the applicant and review applicant shared the wedding costs. She stated he had not understood the question and that was why he answered like that.
8. The Tribunal also put to her that the Department said that they thought that people at her wedding appeared casually dressed and she stated that during the morning celebrations they were formally addressed but in the evening when they had dinner, went dancing and were entertained they were very casual. The Tribunal also put to her that the applicant said he did not know any of the onlookers in a particular photograph and they had not been invited but that the review applicant said they were the applicant's family and friends but were poor. She stated he did not understand the question and the neighbours who had lived nearby had just come to visit. When asked for clarification, she stated the guests would come during the day and not care about when they were dressed. When directed back to the question she stated a lot of people attended including family from Australia. The Tribunal again asked, the review applicant stated some of them relatives and some of them were friends or neighbours.
9. The Tribunal put to her that the department had also asked about why a sign was blank to which the applicant had said they forgot to put the names on the sign whereas the review applicant stated that her name was spelt incorrectly so they removed the names. She stated originally they put the name on the sign but it was short an 'A' and the elders suggested that it should be removed because it might confuse immigration. She also stated the wedding was genuine because a lot of people attended.
10. The Tribunal also put to her that the department had said they gave inconsistent information regarding the wedding preparation that is the applicant initially stated that the preparations began two weeks before the ceremony but then stated that arrangements started two months before the ceremony and also said his mother chose 2 April 2016 and advised the review applicant however she told the Department that the original wedding date was March but she could not travel and that she had said that it was the applicant who thought the wedding should take place on 2 April. She stated he was confused and she had asked her husband to organise the wedding but they decided the date together.
11. The review applicant stated the parties first spoke to each other on 15 March 2015 which was his birthday. When asked why she had called him to say happy birthday she stated

because their relatives were close that is, her brother Toeum Min and Chhayheak Nget his sister were close and suggested she should call him. She stated she next spoke to him one week later when she called him.

12. The review applicant stated they first met on 22 March 2016 at the airport and were married on 2 April 2016. She insisted that she spent four weeks with before she married however the Tribunal put her that her movement records suggested that they spent a little over one week together. In total she agreed they had spent less than two months physically together.
13. The Tribunal asked when they formed the intention to spend the rest of their lives together and she stated after the marriage. The Tribunal put to her before they married they would normally have already formed the intention to spend the rest of their life together. She stated they had communicated on the phone and about two months after they first communicated they decided to spend the rest of their lives together. When asked to explain how she had decided given that they had never met she stated after talking to him she felt that she had fallen in love and although he was a different age they were similar. She stated they felt deep love. When asked to explain what deep love meant she stated they met each other and loved each other and when they went out they held hands and did the house chores together.
14. When asked who she had met in his family she stated his older sister, his older brother, his niece, his uncle, his auntie, his friends and neighbours and his mother. In her family he had met her older brother and sister-in-law. She also stated he had never met her children and had only talked to them on the phone.
15. When asked what he did for a living she stated he was in construction and a farmer who planted rice and vegetables.
16. The review applicant stated his family and friends and his sister from Australia were at the wedding. From her side, her brother and sister in law from Australia were at the wedding. When asked why her children were not there she stated because they were grown-up and had work.
17. The Tribunal asked why she had married given that they had spent so little time together before marriage, had decided to marry before they met and even though her children had not met him and were not at the wedding. She stated her children had grown up and she could do what she wanted and they were happy for her.
18. The review applicant confirmed she was previously married and her husband had died in March 2006 because of a road accident.
19. When asked what she and the applicant had in common she stated they liked to do things together, they went out together and they loved each other. She also said she needed someone to support her. She stated they talked together and if he came to Australia they would buy a house together and would like to have children together and he would attend school and work. She also said the last time she saw him was in March 2018 and in total they had spent less than two months together because work meant it was difficult to see him.
20. The Tribunal spoke to the applicant who stated that he had met the review applicant's brother and sister in law. In his family she had met his mother, his older brother, his older sister from Australia and her husband.

21. The applicant stated that he worked in construction and was a rice farmer who also planted vegetables. He also stated that the review applicant was previously married to a man who had died in a car crash in 2006.
22. When asked what they had in common he stated they played video shooting games, listened to music, and talked. The Tribunal asked why he decided to marry her before they had met. He stated he understood her husband passed away and there was no one to care for her or to look after the children and they had communicated over Facebook and she was nice and kind. The Tribunal put to him that her children were grown-up. He stated they still needed support and she also needed support. When asked how much older he was than her children he stated he was the same age as her daughter. When asked if their difference in age was an issue he stated it was not because he loved her with his whole heart and she loved him.
23. The Tribunal put to the review applicant that it was concerned about the speed with which the relationship had occurred, that the parties both decided to marry before they met, that they spent a little over a week together before they married, and since the marriage they had spent less than two months together. The Tribunal also said there was an age difference, and inconsistencies in the evidence which have been discussed. The Tribunal put to her it may not be convinced the relationship was genuine. The review applicant stated they were genuine. it was a genuine wedding but they were not good at talking, and in Cambodia traditionally the parents suggested the wedding and then they decided the wedding together. She also stated she had financial hardship and work commitments which meant they couldn't spend more time together, that they didn't care about age and the only thing was love. The Tribunal also stated her children had not met him. She stated they were older, busy and had their own lives.
24. The adviser stated there was a picture of the applicant's sister at the wedding. She stated the applicant couldn't always understand the department's questions, that family had attended their wedding and that the review applicant's name had been misspelled.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The focus of the Tribunal's considerations in this case is whether the parties are in a spouse or de facto relationship.
26. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
27. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

28. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. There is a Cambodian certificate of marriage on the Departmental file for the parties and on the evidence, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

29. The parties claim they first spoke to each on 15 March 2015, that they first met on 22 March 2016 and were married a little over a week later on 2 April 2016. They have also stated that they met because the review applicant's brother Toeum Min and the applicant's sister Chhayheak Nget were close and suggested the review applicant should call the applicant on his birthday.
30. The Tribunal has considered the evidence of the financial and social aspects and the nature of the parties household and their commitment to one another. In assessing the nature of the commitment to each other the Tribunal has also considered the circumstance of the parties meeting, relationship development and length of time together, the degree of companionship and emotional support that they draw from each other and whether the applicant and review applicant see the relationship as a long-term one.

Financial

31. The parties have stated that they have spent money on the wedding, gifts and that the review applicant has transferred money to the applicant. However, the Tribunal has concerns with this evidence, that is at interview it is recorded in writing that the applicant stated that the review applicant provided the funds for the wedding however in a statement made by the review applicant, she said that they shared the costs. When this inconsistency was put to the review applicant at hearing, she stated that the applicant did not understand the question. The Tribunal has considered whether the applicant was confused about questions about who paid for the costs of the wedding and who arranged for and decided on the wedding date. While the Tribunal has considered this submission, it also considers that the detail in the applicant's recorded answers at interview does not suggest to the Tribunal that the applicant did not understand the question or was confused.

Nature of Household, Social aspects and commitment to one another

32. The Tribunal has also considered the social aspects of the relationship that not only include the wedding but also statutory declarations from Ms Mony Noun (the review applicant's sister in law), Toeum Min, the review applicant's brother, Ten Kong and Rin Tuy (the applicant's cousins). In addition, at interview, it is recorded in writing that when asked about people surrounding the applicant and review applicant in a specific wedding photograph, the applicant he did not know the people but the review applicant stated they were the applicant's family and friend. When this was put to the review applicant at hearing, she again stated that he did not understand the question and that neighbours, friends and relatives had attended. In addition, it is recorded at writing that when asked about a blank sign, the applicant stated that the agency hired to provide decorations forgot to put the names on the sign but the review applicant stated that they had incorrectly spelt her name and it was suggested that it should be removed because it might confuse immigration. When this inconsistency was put to the review applicant at hearing, she repeated her evidence.

33. In addition, at interview it is recorded in writing that when asked about the wedding preparations, the applicant stated that his mother arranged most of the wedding, that she decided on the date 2/04/2016 and told the applicant and review applicant that this was the date she had arranged however the review applicant stated that the applicant decided on the date. When this was put to the review applicant at hearing, she stated the applicant was confused and that the applicant had organised the wedding but they had decided the date together.
34. The Tribunal finds that the parties provided inconsistent evidence in relation to things such as who arranged the marriage, who paid for the wedding, why a blank sign failed to identify the parties, and who was actually at the wedding. The Tribunal considers that such discrepancies do not suggest a genuine marriage or a genuine relationship. The Tribunal also finds that when all the evidence both documentary and oral is taken as a whole and weighed against the speed of the relationship including the decision to marry a little over a week after they first physically met, the Tribunal is not satisfied that the parties are telling the truth about the inception or progress of their relationship or that there is a mutual commitment to a shared life to the exclusion of others. In reaching this conclusion, the Tribunal has considered that the parties' explanation at hearing in relation to things such as their decision to marry as well as the things they had in common. When asked about their hasty decision to marry, the review applicant stated they were in deep love which meant that when they went out they held hands and did house chores together. The Tribunal finds the review applicant's answers as to why she committed to the applicant and even though her children have never met him to be both formulaic (in that it appeared to parrot the legislative provisions) and shallow and not indicative of serious reflection or serious commitment. Similarly, the applicant stated that his reasons for the speedy decision was that he understood the review applicant's husband had passed away and there was no one to care for her or to look after the children and that she was nice and kind, however the Tribunal finds that his answer too reflected a lack of thought given that he was then unable to explain why the review applicant's children who were his age needed looking after. Again, when asked what things they had in common, the parties' answers suggested no serious reflection, that is the review applicant stated they liked to do things together and went out together even though they married a little over a week after they first physically met and the applicant stated they played video shooting games, listened to music and talked together. In the Tribunal opinion, the parties' shallow answers to important questions about the relationship do not reflect a degree of communication, companionship or emotional support that is consistent with a genuine relationship. Neither does the speed of their decision to marry or the shallowness in their answers reflect any real commitment to one another.
35. The Tribunal has also considered the third party statements that have been tendered by the parties and state that they are in a genuine and continuing relationship and are committed to one another however given its credibility concerns, the Tribunal does not accept that this evidence is proof of a genuine relationship and does not place any weight on these third parties' affidavit's claims.
36. While the Tribunal also considered the evidence of the review applicant's subsequent return to Cambodia after the marriage on two occasions, the entire time the parties have been physically together at most totals less than two months and given its credibility concerns, the Tribunal is not satisfied that they parties are in a genuine relationship. The Tribunal has also considered the photos and evidence of telephone and Face book communication however given the Tribunal's concerns with the parties' credibility, the Tribunal does not accept that this evidence is proof of a genuine relationship.

37. In sum, the Tribunal accepts that the parties have been introduced to each other and know some things about each other (such as the applicant's work and the circumstances under which the review applicant's former spouse died). The Tribunal also accepts they have exchanged money and gifts and at least one of them has paid for the wedding. However, the Tribunal does not accept that the wedding costs and gifts to each other and the transfer of money from the review applicant to the applicant is determinative of a genuine relationship and must be weighed against the other evidence. The Tribunal also accepts that they have spent time together and when together, share housework duties. However the Tribunal also finds that even though they have spent some time together and there may be a co- operative relationship between them, their time together has been limited, they are not credible and the Tribunal is not satisfied that there is a mutual commitment to a shared life to the exclusion of all others or that the relationship is genuine and a continuing relationship or that they live together and not separately and apart on a permanent basis.
38. Given these findings the Tribunal **is not** satisfied that at **the time the visa application was made and the time of this decision** the parties were in a spousal relationship.
39. Therefore the visa applicant does not meet cl.309.211 and cl.309.221.
40. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

41. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Angela Cranston
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).